

CANADA / JUDGMENT

R. v. Tso

2020 BCCA 358

COURT

British Columbia Court of Appeal

DECIDED

15 December 2020

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2020 BCCA 358 R. v. Tso COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Tso, 2020 BCCA 358 Date: 20201215 Docket: CA46338 Between: Regina Respondent And Henry Tso Appellant Restriction on publication: A publication ban has been mandatorily imposed under

- s. 486.4(2) of the Criminal Code in cases involving sexual offences to ban the publication, broadcasting or transmission in any way of evidence that could identify a complainant or any witness under the age of 18. This publication ban applies indefinitely unless otherwise ordered. Pursuant to s. 16(4) of the Sex Offender Information Registration Act [SOIRA], no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA. Before: The Honourable Madam Justice Newbury The Honourable Madam Justice Saunders The Honourable Mr. Justice Harris On appeal from: An order of the Provincial Court of British Columbia, dated June 18, 2019 (conviction) (R. v. Tso, Vancouver Docket 249831-1). Counsel for the Appellant (via videoconference): D.G. Butcher, Q.C. E. Holzman Counsel for the Respondent (via videoconference): C.L. Morgan Place and Date of Hearing: Vancouver, British Columbia November 26, 2020 Place and Date of Judgment: Vancouver, British Columbia December 15, 2020 Written Reasons by: The Honourable Mr. Justice Harris Concluded in by: The Honourable Madam Justice Newbury The Honourable Madam Justice Saunders Summary: Appeal of a conviction for sexual assault. The factual issue at trial was whether the Crown had proved that the accused had had sex with the complainant without using a condom contrary to her requests. The accused denied that sexual intercourse had occurred as alleged. On appeal the appellant argued that the judge made errors in his use of a prior voluntary statement given by the accused in assessing his credibility, erred by discrediting his evidence on the basis that he had tailored it to respond to the case he had to meet, and made improper use of text messages he exchanged with the complainant after the alleged assault to bolster her credibility. Held: Appeal dismissed. The judge did not fall into the alleged errors. He did not assess credibility by relying on differences between the voluntary statement and the accused's evidence at trial. He did not disbelieve the accused because he had tailored his evidence in light of Crown disclosure. He did not rely on the complainant's messages in a text conversation as prior consistent statements. Rather he relied on the text conversation for admissions against interest made by the accused. Reasons

for Judgment of the Honourable Mr. Justice Harris: Introduction and background

- [1] Mr. Tso appeals his conviction of a single count of sexual assault. The judge found that Mr. Tso had forced sexual intercourse without a condom on the complainant. He accepted that Mr. Tso and the complainant had, on that evening, earlier engaged in consensual sexual intercourse using a condom. The complainant made it a precondition of consent to intercourse that Mr. Tso wear a condom. The assault happened when, despite the complainant demanding that Mr. Tso wear a condom, he did not do so. The complainant repeatedly told Mr. Tso to get a condom and tried to push him away and get up. She told Mr. Tso to stop and said no. The judge found the complainant had not consented to sexual intercourse on that occasion and convicted Mr. Tso.
- [2] Mr. Tso testified. The evidence of the complainant and Mr. Tso was fundamentally consistent up to the events leading up to the alleged incident of assault. Mr. Tso said that prior to the alleged assault he had not got a condom because he had been unable to get an erection. He stopped engaging in sexual activity when asked to do so. He said he and the complainant had not had sexual intercourse on the occasion of the alleged assault, let alone without a condom.
- [3] Mr. Tso did not allege consent or mistaken belief in consent. The determinative issue was whether a final act of sexual intercourse without a condom occurred as described by the complainant.
- [4] One initial comment is in order. Both Mr. Tso and the Crown agree that this appeal does not raise any issue about whether the evidence of prior sexual history at trial was improperly admitted or improperly relied on by the judge.
- [5] Mr. Tso alleges that the judge erred in principle in his assessment of Mr. Tso's credibility, and in the use he made of certain text messages exchanged a few days after the incident. I will set out the errors shortly, but it is convenient to provide some background to place them in context.
- [6] Mr. Tso and the complainant "met" through an online app. The complainant was candid that she used the app to "hook up" with men for sex. The two of them met in person on two occasions a couple of days apart. The complainant and Mr. Tso engaged in consensual sexual activity with a condom on the first evening. The complainant initiated a second meeting with Mr. Tso. On that evening they socialized for a time, went into the bedroom, engaged in further sexual activity, and had sex using a condom.
- [7] The incident that is the focus of the trial occurred a little later. The complainant testified that Mr. Tso initiated further sexual activity and she told him repeatedly to get a condom. Mr. Tso did not do so. Rather, he penetrated her vagina. She told him to stop and to go and get a condom. He did not do so, but continued to have sex with her. The complainant tried to push him away, but he continued until he was done. The complainant said that as she attempted to get out from underneath Mr. Tso she dug her fingers into her thigh, leaving a

mark. A photograph of an injury consistent with this evidence was an exhibit at trial. After the incident, the complainant decided to leave, although Mr. Tso wanted her to stay. Before she left, she said, Mr. Tso promised to use a condom in the future.

- [8] Mr. Tso disputed the complainant's account. In short, he said that when they began to re-engage in sexual activity he could not get an erection. He agreed that the complainant had asked him to get a condom, but claimed he had said they should wait because he was not erect. He then, with the complainant's consent, attempted to get an erection by rubbing his flaccid penis against her vagina. Again, in response to the complainant's request for him to get a condom, he said he was not yet ready. At about this time, the complainant asked him to stop, saying she did not want to continue. He said he stopped. The complainant asked him why it took him so long to get a condom. He replied that he was not ready, and they could just cuddle. Then her mood changed. The complainant said that he was just like all the other guys and that he just wanted her for sex. The complainant claimed he was not attracted to her and badgered him about it. He said sarcastically that yes, he did not find her attractive. The complainant went into the bathroom for five minutes, then came out, and said she needed to leave.
- [9] Mr. Tso and the complainant exchanged text messages after the incident. Messages exchanged two to three days later were entered into evidence. I will return to these messages in considering the use the judge made of them.
- [10] Mr. Tso also gave a long voluntary statement to a police officer some weeks after the incident. Again, I will return to this statement in assessing whether the judge used it improperly.
- [11] Credibility was the critical issue at trial. Given that Mr. Tso gave evidence, the judge employed the *R. v. W.(D.)* ([1991] 1 S.C.R. 742) framework. The judge did not believe Mr. Tso and found his evidence did not raise a reasonable doubt. He found his testimony that he stopped sexual contact with the complainant when she told him to "strained the limits of credibility beyond the breaking point." He identified inconsistencies in Mr. Tso's evidence observing that parts of his evidence bore no rational connection to other parts. He characterized Mr. Tso's efforts to explain the text messages as "nonsensical".
- [12] By contrast, the judge found the complainant credible and reliable. The judge accepted her account that she twice told the appellant to get a condom as he was preparing to have sexual intercourse with her, but that he did not do so and, shortly thereafter, he proceeded to insert his penis into her vagina as she repeatedly told him to stop and was trying to get out from underneath him.
- [13] Mr. Tso raises three grounds of appeal. First, he says the judge made improper use of a voluntary statement he gave to the police by relying on certain matters Mr. Tso had omitted to tell the police, but about which he gave evidence at trial. He argues that the judge violated his right to silence by relying on those omissions to discredit his evidence at trial. Second, he argues that the judge erred by discrediting his evidence on the basis that he had tailored

it to respond to the case he had to meet. Third, Mr. Tso alleges the judge made improper use of text messages he exchanged with the complainant after the alleged assault to bolster her credibility. In short, the judge treated the complainant's prior consistent statements as confirming her evidence at trial.

[14] For the reasons that follow, I would dismiss the appeal.

Analysis

Did the trial judge improperly rely on omissions in Mr. Tso's statement to assess his credibility?

- [15] The parties agree about the principle governing the use a trier of fact may make of an accused's voluntary, pre-trial statement in assessing the credibility of his evidence at trial. The issue arises because an accused is entitled to rely on his right to silence in giving a statement and, accordingly, may omit or not disclose certain matters. In those circumstances, omissions from a statement cannot ground inferences of guilt unless they amount to inconsistent versions of fact covering precisely the same topic. These principles are more fully explained by the Ontario Court of Appeal in *R. v. Kiss*, 2018 ONCA 184, paras. 41 and 47-9.
- [16] Both counsel proceeded to argue the appeal on the basis that the principle in *Kiss* was engaged. Mr. Tso had given a lengthy voluntary statement about the events in issue and had not mentioned, among other matters, in those parts of the statement put to him at trial, that he had not got a condom because he could not get an erection. The focus of the argument on appeal was whether this was an omission (Mr. Tso said he had not provided that detail because he was embarrassed and his statement was not a complete account) or an inconsistency, among others, that the judge could properly weigh in assessing Mr. Tso's credibility.
- [17] The judge raised the issue of what use he could make of the voluntary statement during argument. I extract the material portion of what he said: I think I was trying to make this point yesterday - only to attack his credibility. What's in the statement, in my view, is not evidence. The Crown didn't tender the statement So in terms of impeaching or attempting to impeach someone's credibility, it's - I mean, we see it every day where - that happens I'll check my notes, but what I largely got out of Mr. Ip's cross-examination on the statement were things that were not in it, as opposed to inconsistencies with the testimony, right, as opposed to - somebody saying in court it was red, and saying in the statement it was black. It just says it was red, and the statement doesn't mention it was red. [Emphasis added.]

- [18] It is, I think, apparent that the judge in this colloquy correctly identified the point raised on appeal. Mr. Tso contends that the judge lost sight of his observation that the cross-examination rested on things that were not in it, rather than inconsistencies. The Crown suggests that when it came to assessing Mr. Tso's credibility, the judge must have come to the view that Mr. Tso's evidence on material matters was in fact inconsistent with his trial evidence.
- [19] I mention this because I am not persuaded the judge did move away from his insight about what the cross-examination illuminated about the voluntary statement.
- [20] It is necessary, then, to pay particular attention to how the judge reasoned to his conclusions. As I shall explain, I do not think he relied on differences between Mr. Tso's voluntary statement to the police and his evidence at trial. Rather, the judge assessed the plausibility of Mr. Tso's trial evidence and found that he could not believe it. In fact he found it nonsensical and that it strained credulity beyond the breaking point. His analysis did not depend on rejecting Mr. Tso's evidence of trial because in his voluntary statement he had said something different (that was inconsistent with his trial evidence) or had omitted to say things he relied on at trial. As a result, the principle relied on by Mr. Tso is not engaged.
- [21] The first point to make is that Mr. Tso does not allege that the judge misapprehended the evidence and, in particular, the evidence given by him at trial. After reciting the evidence, the judge turned to his W.(D.) analysis. He began by assessing whether he accepted Mr. Tso's evidence, ultimately concluding that he did not. It did not give rise to a reasonable doubt.
- [22] It is useful to recite in a little more detail what Mr. Tso had to say. I set out the judge's summary, beginning at para. 32:
- [32] Mr. Tso testified he was digitally penetrating J.S.'s vagina as they lay in bed. He said this went on for approximately 15 minutes and that, as that was happening, J.S. was not manipulating his penis and that his penis was not erect. He said J.S. asked him to get a condom, to which, he replied to wait a little bit because he was not erect. Mr. Tso said that he then asked J.S. if he could rub his penis against her vagina to try to get an erection and said that she agreed.
- [33] Mr. Tso said that he then got on top of J.S. and did that for approximately one minute, at which point, J.S. again asked him to get a condom. Mr. Tso said that he responded he was not ready as he still did not have an erection. He said that, at that point, he tried to arouse himself by kissing J.S.'s neck and breasts, but that after doing so for approximately one minute, J.S. told him to stop, that she did not want to do this anymore. Mr. Tso said that he stopped immediately. Mr. Tso said that he then sat on the bed and that J.S. asked him why it had taken him so long to get a condom, to which he replied that he was not ready and they could just cuddle instead. Mr. Tso said that J.S.'s mood changed at this point and she accused him of being like the other men, that he just wanted her for sex and that he was not attracted to her.

- [34] Mr. Tso described J.S. as being upset and angry and said that she was badgering him about these things. Mr. Tso said that in an attempt to stop the badgering, he sarcastically agreed that he was not attracted to her, at which point, J.S. got up and went into the washroom. Mr. Tso testified J.S. was in the washroom for approximately five minutes and that she was still angry and, when she came out, he said she accused him of having insulted her by having rejected her and repeated that he did not find her attractive and he was like the other men.
- [35] Mr. Tso said J.S. then started getting dressed and he did, as well. He said he offered her a ride home, but when he could not find his keys, J.S. became even more upset and left his residence. He said that, after he found his keys, he went looking for J.S. unsuccessfully so he sent her a text to let him know she had gotten home safely.
- [23] This is how the judge assessed Mr. Tso's evidence. First, he found that Mr. Tso's evidence that he stopped sexual contact when the complainant asked him to "in many respects strained the limits of credulity beyond the breaking point": at para. 40. He said it would be unlikely that there would have been two requests that he get a condom if he did not have an erection. He continued that had the complainant realized that Mr. Tso did not have an erection when she made her first request, after being told by him that he did not have an erection, she would not have repeated her request if he remained flaccid.
- [24] This reasoning is a rejection of Mr. Tso's evidence that he did not get a condom because he did not have an erection. The analysis turns solely on the judge's assessment of the evidence Mr. Tso gave at trial. It does not depend on any comparison of that evidence with his voluntary statement. There is nothing in this portion of the credibility assessment that could warrant appellate intervention.
- [25] The judge then turned to Mr. Tso's claim that he got on top of the complainant after getting her consent to rub his penis on her vagina. The judge found that this was "even more unlikely" (presumably than the evidence he had just rejected) given that she had only just requested that he get a condom. The judge then rejected Mr. Tso's evidence that the complainant became angry because it took him so long to get a condom. In light of the common ground that Mr. Tso did not get a condom at all, the judge concluded, at para. 41, that "the question would be why he did not get a condom rather than a complaint about how long it took him to get a condom."
- [26] Once again, this is a rejection of Mr. Tso's evidence at trial. The assessment does not depend at all on any difference between it and his statement. The judge rejected the evidence because he found it inherently improbable and incapable of belief. This is a conclusion the judge was entitled to reach. Mr. Tso does not allege any error, on this ground, except that the judge made impermissible use of the statement.
- [27] The next piece of evidence examined by the judge was Mr. Tso's claim that the complainant started to accuse him of just wanting her for sex like other men. The judge said that comment bore no rational connection to the complainant being angry that it took Mr. Tso too long to get a condom. He continued: "Being accused of just wanting sex immediately

upon having stopped foreplay, as testified to by Mr. Tso, is not consistent with taking too long to get a condom." Again, this is a credibility assessment based only on Mr. Tso's evidence at trial.

- [28] It was at this point in the analysis that the judge made his only reference to the statement. The judge responded to an argument advanced on behalf of Mr. Tso that what he really meant was that the complainant was angry with him because he was unable to get an erection. The judge said this:
- [42] Mr. Tso did not explicitly testify to this effect nor did he allude to this when he was being interviewed by the police. If this was the actual case that she was angry because he was unable to get an erection, it makes even less sense that J.S. would complain about the time it took him to get a condom.
- [29] In my opinion, the remark that Mr. Tso had neither testified to that suggestion, nor alluded to it in his statement, merely sets the stage for the judge to explain why he rejected the argument advanced on Mr. Tso's behalf. In substance, the judge rejected the assertion because, assuming it were true, and Mr. Tso could not get an erection, it would make "even less sense" that the complainant would be complaining about how long it took him to get a condom. The reasoning here is predicated on the implausibility of the complainant being angry about how long it took to get a condom, if he did not have an erection. I do not think the judge can fairly be read as having fallen into a trap of disbelieving Mr. Tso's testimony because he had failed to say it in his statement anymore than that he had not testified to that fact at trial. The judge dealt with the issue as an attempt to explain the "real" meaning to be reached by the interpretation of his evidence and drawing inferences therefrom.
- [30] In the result, I am not persuaded that the judge fell into the alleged error. This is not because, as the Crown argued, the judge made permissible use of the voluntary statement, but because he did not rely on it in any material way in his credibility assessment. I would not accede to this ground of appeal. Did the trial judge err in rejecting the appellant's evidence on the basis that he tailored his evidence to meet the Crown's case against him?
- [31] Mr. Tso points to the following paragraph of the reasons for judgment, which he says contains an error of principle.
- [43] In all the circumstances, I find that Mr. Tso testified about the fact that he did not get a condom because he knew that he was being accused of having sexual intercourse without one. Further, I find that he testified about his failure to obtain an erection as an explanation for not getting a condom. Of course, at trial, Mr. Tso was aware of the allegations against him, but he was not necessarily aware of them shortly after the events in question. The text messages are of significance in this regard. On a plain reading, the text messages are not consistent with Mr. Tso's evidence and his attempts to explain them in his testimony were, in my view, nonsensical.

- [32] Mr. Tso relies on the authority of *R. v. White* (1999), 132 C.C.C. (3d) 373 (Ont. C.A.) in which Doherty J.A. explained at para. 20: As a matter of common sense, there may be considerable force to the suggestion that a person who gets full advance notice of the other side's evidence and testifies last is in a position to tailor his or her evidence to fit the disclosure. That inference, no matter how logical, cannot be drawn in without turning fundamental constitutional rights into a trap for accused persons.
- [33] This proposition has been more fully articulated by Sharpe J.A. in *R. v. Thain*, 2009 ONCA 223:
- [20] It is wrong to state as a general proposition that the credibility of an accused must be assessed "bearing in mind that his explanation comes long after disclosure was available to him".
- [29] In my view, the fact that the accused enjoyed his constitutional right to disclosure had no bearing on his credibility in this case and the trial judge erred in law by stating that it did. Even if the disclosure might possibly have had a bearing on credibility, trial fairness demanded that the accused be confronted with the suggestion and afforded the opportunity to refute it or make submissions before being disbelieved on that account.
- [34] The principles governing how and whether Crown disclosure can be used to discredit the evidence of an accused who testifies with knowledge of it are settled. This Court has recognized them in *R. v. Murray*, 2020 BCCA 42. The issue is whether the judge breached those principles by discrediting Mr. Tso's evidence because he had tailored it to meet the case the Crown had disclosed.
- [35] With respect, I am unable to give effect to this ground of appeal. I do not think the impugned paragraph can or should be read as Mr. Tso contends. As I read the paragraph, the judge is saying that Mr. Tso fabricated an innocent explanation of the incident (no condom, no sex, because no erection). Although by trial he knew the case against him, he did not necessarily know what he was accused of shortly after the event. In order to evaluate his evidence it was therefore significant to examine what he said at a time when he did not necessarily know the allegation. That was why it was important to examine the text messages exchanged within a few days of the incident. In those messages, as we shall see, Mr. Tso acknowledged that he had had sex with the complainant without a condom and that she was upset about that.
- [36] Accordingly, I do not read the paragraph as suggesting that Mr. Tso tailored his evidence to meet a case that the Crown disclosed to him and that he should be disbelieved because he had done so. Rather, Mr. Tso fabricated the innocent explanation to respond to what, in fact, he was aware of as revealed by admissions he had made in a text conversation. While he did not necessarily know at the time of this conversation what the allegation was, his texts reveal that he was in fact addressing a complaint that he had proceeded to penetrate her without a condom contrary to her request. Subsequently, he came up with an innocent explanation to address the substance of the complaint, which the judge rejected as

incredible. The judge did not disbelieve Mr. Tso because he was responding to Crown disclosure. I do not think the effect of Crown disclosure played any part in the judge's reasoning.

- [37] As I think is clear from my analysis of the judge's credibility assessment so far, the judge found Mr. Tso's evidence to be incredible because of its inherent implausibility, internal inconsistencies and nonsensical character, not because he had thought he had tailored it to meet the Crown disclosure, without giving Mr. Tso an opportunity to respond to that suggestion. This conclusion is reinforced, in my view, by the manner in which the judge dealt with the effect of the text messages. As we shall see, he concluded that Mr. Tso acknowledged a few days after the incident that the complainant was angry with him for not using a condom when they had sex. In my view, that finding is the critical finding of fact that undermined Mr. Tso's defence, even though without it the judge found his evidence so unworthy of belief it did not raise a reasonable doubt. Did the trial judge misuse the text conversation improperly to bolster the complainant's credibility.
- [38] This ground of appeal raises again the issue of the proper use of text conversations occurring in the aftermath of an alleged criminal incident and, in particular, what proper use may be made of a prior consistent statement by the victim.
- [39] It is uncontroversial that a trial judge may not use a prior consistent statement to support the prohibited inference that a witness's testimony is more likely to be true because it has been repeated more than once. It is also clear that permissible uses include: (1) text messages sent by the accused as admissions against interest; (2) text messages sent by a complainant to provide context to the answers given by the accused; (3) text messages to rebut an allegation of recent fabrication; and (4) text messages used to show that they were exchanged, and the timing and circumstances of the exchange, used by the trier of fact in assessing the credibility and reliability of the witness's in-court testimony (the "narrative as circumstantial use" exception). The latest word on the proper use of text messages is the judgment of Chief Justice Bauman in *R. v. Langan*, 2019 BCCA 467 (approved 2020 SCC 33). Useful commentary is also found, for example, in *R. v. C.M.M.*, 2020 BCCA 56 where Justice DeWitt-Van Oosten explained:
- [152] The more controversial issue is whether the trial judge used B.P.'s prior statement for an improper purpose. The fact that a prior consistent statement has been properly admitted does not insulate that statement from review. The trial judge must also ensure its proper use: *R. v. Langan*, 2019 BCCA 467 at para. 53.
- [153] Ellard makes clear that statements admitted to rebut an allegation of recent fabrication must be used for that purpose and "not to support the fact at issue or the general reliability of the witness" (at para. 42). See also Stirling at para. 7. This same limitation governs the narrative as circumstantial evidence exception. The prior statement may not be relied on to infer that a witness is more likely to be telling the truth because they said the same thing more than once: *Langan* at para. 42; *R. v. Gill*, 2018 BCCA 275 at para. 68.

- [40] It bears repeating that potential problems in trials, especially sexual assault trials, can be avoided if the purpose of admitting prior statements, including text conversations, is clearly articulated when the evidence is admitted. Equally, appellate review is greatly assisted if trial judges are explicit about the basis of the use of a prior statement in finding facts. A general statement about consistency of a prior statement with trial evidence raises questions about whether the statement is being used properly. Such general statements require a court on appellate review to decipher or interpret whether the use was proper: an inquiry potentially forestalled by an explicit articulation of the basis of use.
- [41] Here, Mr. Tso impugns the underlined portion of para. 49 of the reasons for judgment. It reads:
- [49] I found [the complainant] to be both creditable and reliable. I accept her version of the events and find that she twice told Mr. Tso to get a condom as he was preparing to have sexual intercourse with her, but that he did not do so and, shortly thereafter, proceeded to insert his penis into her vagina as she repeatedly told him to stop and was trying to get out from underneath. The text messages are consistent with the version of events she testified to. I have no doubt that she and Mr. Tso were discussing in the text messages his failure to wear a condom during sexual intercourse after she had told him to stop.
- [42] I will explain why I do not think the judge made an error in his analysis. The text conversation was brief. The portion put into evidence starts a couple of days after the alleged incident. The first message, the judge found, was not the beginning of the conversation. The complainant had deleted some earlier messages, but then kept these: Sender Text Message Timestamp HT Hi baby. Jan20/2017 10:44 p.m. HT You knew I was into you and was crave you Jan20/2017 10:45 p.m. HT Is it bad that I feel a connection and wanted to be close to you Jan20/2017 10:45 p.m. HT Do you want to be with me? Jan20/2017 10:46 p.m. JS I did Jan21/2017 12:15 a.m. JS But now idk if I can trust you Jan21/2017 12:15 a.m. HT I want to see you soon Jan21/2017 7:08 a.m. JS Your not even acknowledging what im saying and what you did was fucked u Jan21/2017 10:06 a.m. HT That was my explanation Jan21/2017 1:46 p.m. HT Spur of the moment. I was playing with your pussy for so long. I want to be close to you Jan21/2017 1:50 p.m. HT I want you to m self and not share you Jan21/2017 1:50 p.m. JS But i dont think you get it when someone says stop you stop Jan21/2017 1:51 p.m. HT Do you want to be together or not? Jan21/2017 1:52 p.m. HT I'm telling you I want you in my life and you are not listening HT I feel we have a connection and I want to protect from other guys Jan21/2017 1:53 p.m. HT Will you give us another chance? 21Jan2017 1:54 p.m. JS Because you hurt me. Do you think it's unjustified that i left and was angry 21Jan2017 1 :54 p.m. HT Yes. I don't want an other guys to hurt you 21Jan2017 1:55 p.m. JS But YOU hurt me 21Jan2017 1:55 p.m. HT We were having such a good time together 21Jan2017 1:56 p.m. HT Everything we done Jan21/2017 1:56 p.m. HT What do you want me to say? Fine we will always use a condom Jan21/2017 1:57 p.m. JS Omg Jan21/2017 2:06 p.m. JS I want you to say that when i say stop youll listen to me and respect me for that Jan21/2017 2:07 p.m. JS But you couldn't come up with that urself so idk Jan21/2017 2:07 p.m. HT All the

other stuff I say you don't care about Jan21/2017 2:25 p.m.

- [43] The trial judge did not accept that the first message he sent after asking the complainant to confirm that she got home safely was the first message entered into evidence. He accepted that there were other messages which the complainant had deleted. He viewed the messages in evidence as a continuation of a discussion. The judge emphasized what he took to be the most significant parts of the conversation and the parties' explanation of what they intended to communicate.
- [44] The judge highlighted that Mr. Tso responded to the suggestion that what he did was "fucked up" by explaining that it was on the spur of the moment after fondling her genitals for a long time. Next, when the complainant said Mr. Tso did not get it that, when someone says stop, you stop, his answers were, "Do you want to be together or not?," and, "Will you give us another chance?" Finally, when the complainant said Mr. Tso had hurt her, he replied that they had been having a very good time and continued with, "What do you want me to say? Fine, we will always use a condom".
- [45] The judge analysed these exchanges briefly, after observing that on a plain reading the messages were not consistent with Mr. Tso's trial evidence and his explanations of them were nonsensical:
- [44] Mr. Tso said that he believed J.S. was referring to the fact he was unable to get an erection when she texted him that what he did was "fucked up," and that his reply that, "It was on the spur of the moment" was in reference to her badgering him which came at some point later in time according to his evidence. If that is what Mr. Tso believed J.S. was referring to, his response makes no sense whatsoever. His answers to the, "When someone says stop, you stop," message are not at all responsive and appear to be meant to deter J.S. from that line of inquiry by assuring her that he was interested in a relationship with her.
- [45] Mr. Tso said that when he texted, "Fine, we will always use a condom," that it was just a general statement meant to appease J.S. It clearly is not a general statement. It is a specific reference to not having worn a condom. In my view, it is not a reference to it taking a long time to get a condom or, as was submitted, to the fact that he was unable to get an erection. I do not accept any of Mr. Tso's evidence with respect to the text messages.
- [46] This provides the context for the judge's impugned comment in para. 49. In my opinion, the judge had made a clear and unequivocal finding that what Mr. Tso said in the text messages was inconsistent with his evidence that he had not had intercourse with the complainant without wearing a condom. In other words, the messages amounted to an admission that he had not worn a condom contrary to the requests of the complainant. This finding does not depend on her side of the conversation, except to the extent that her messages provide context to understand what it was that Mr. Tso was saying, acknowledging and admitting in his responses. No work is being done here by any consistency between what the complainant said at trial and what she said in the messages.

- [47] Mr. Tso accepts that using the messages to determine whether they contained admissions against interest is a proper use of them. He contends, however, that the judge went further and relied on the consistency between the complainant's messages and complainant's trial evidence to bolster her credibility. I do not agree. I accept the Crown's submission that the judge only used the complainant's side of the conversation to provide context. Moreover, the complainant's side of the conversation is not, standing alone, an allegation that Mr. Tso had had sex with her without a condom and had continued to do so even when she said no. Nor do those statements ground an inference to that effect. The factual conclusion can only be reached by interpreting what Mr. Tso said.
- [48] I observe that the judge's comment is that the text messages are consistent with the version of events to which the complainant testified. The judge did not say, and did not mean, that what the complainant said in those messages is consistent with her version of events. His conclusion is based on what they were discussing jointly. They were discussing his failure to wear a condom. The subject matter of the conversation is derived from Mr. Tso's admissions made in the context of her messages to him. The judge relied on the conversation as confirming the complainant's evidence at trial because it contained an admission against interest by the accused. The conclusion that the conversation contained the admission required a reading of both sides of it. The complainant's side provided the context for understanding what Mr. Tso was acknowledging. As I have said, standing alone, the complainant's side could not permit an inference that Mr. Tso had sexual intercourse with the complainant without using a condom without her consent. That inference depends on reading the conversation as a whole and crucially on what Mr. Tso said in it. I do not think the judge fell into error in his use of the text messages.
- [49] I would not accede to this ground of appeal.

Disposition

- [50] I would dismiss the appeal. "The Honourable Mr. Justice Harris" I agree: "The Honourable Madam Justice Newbury" I agree: "The Honourable Madam Justice Saunders"

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Prepared on 26 October 2026 · Esheria